No. 90-1

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In The

Supreme Court of the United States

October Term, 1990

City of Little Rock, Arkansas, Walter E. "Sonny" Simpson, E.H. "Doc" Hale, Joe Thomas, Brad Furlow, Lottie L. Shackelford, J.W. "Buddy" Benafield, Sharon Priest, Tom Milton, Thomas Prince, and F.G. "Buddy" Villines,

Petitioners,

v.

Reather Reynolds, as Administratix of the Estate of John Willie Reeves, deceased, and in her own behalf,

Respondents.

BEST AVAILABLE COPY

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether in a civil action use of peremptory challenges by government litigants to strike the only blacks on the panel violated the Equal Protection Clause of the Fourteenth Amendment as construed in *Batson v. Kentucky*, 476 U.S. 79 (1986).

SUPPLEMENTAL INFORMATION

Pursuant to Supreme Court Rule 15.7 the City wishes to inform the Court of an intervening matter not available at the time of the filing of the Petition for Writ of Certiorari. On June 28, 1990, a hearing was held before United States District Judge Henry Woods concerning the Respondent's (Reynolds) challenge to the Petitioner's (Citys) exclusion of certain jurors. Judge Woods ruled that the City had objective non-racial bases for its exercise of peremptory challenges and, therefore, denied Reynolds relief by Order dated June 29, 1990. (A copy has been lodged with the Clerk). Reynolds has since appealed this decision to the United States Court of Appeals for the Eighth Circuit. The City has filed a Motion seeking a stay of that Appeal pending the outcome of this petition. The Motion for a Stay was denied on September 17, 1990.[1]

ARGUMENT

Reply to the reasons to deny the writ.

1. This case provides the Court an excellent opportunity to determine if the rule in Batson concerning the use of peremptory challenges should be applied in civil cases involving government litigants.

The City has contended that there are two reasons for granting the writ in this case. The first is to resolve

[1] Although the City has not been successful in gaining a stay of the second appeal, it does not affect the issue presented in this petition – i.e., whether *Batson* applies to a civil case, particularly a civil case involving government defendants. This issue is being timely presented to the Court for its review.

a conflict between the Eighth, Eleventh and Fifth Circuits. Supreme Court Rule 10.1(a). The second reason is that this case addresses an important question of federal law not yet ruled upon by this Court. Supreme Court Rule 10.1(c). Reynolds disagrees that there is a conflict in the circuits. However Reynolds has not challenged the fact that this case presents an important question of federal law. The City continues to assert both bases as reasons to grant the writ.

Reynolds contends that *Batson v. Kentucky*, 476 U.S. 79 (1986), is clearly applicable to civil cases as held by the Eighth Circuit. [Reynolds Brief at 3-4]. However, it is not at all clear that this Court ever intended such a result. In fact, this Court has referred to *Batson* as a new rule of *criminal* procedure. See *American Trucking Association, Inc. v. Smith*, 110 S. Ct. 2323, 2331 (1990)[2] citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1928).

Despite Reynolds' contrary position, the Eighth Circuit and the Fifth Circuit are in conflict. Compare *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990)

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[2] In discussing the retroactive application of new principles of law, this court said

> Although the Court has recently determined that *new rules of criminal procedure* must be applied retroactively to all cases pending on direct review or not yet final, see *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). . . . [Emphasis added]

American Trucking Association, Inc. v. Smith, 110 S. Ct. 2323, 2331 (1990).

Of course, the question in *Griffith v. Kentucky* is whether to retroactively apply the rule in *Batson*.

with *Edmondson v. Leesville Concrete Company,* 895 F.2d 218 (5th Cir. 1990). It is true that *Edmondson* contains a footnote which acknowledges the absence of a state litigant. *Edmondson,* 895 F.2d at 222 n.10. However, the rationale for *Edmondson* clearly illustrates that the Fifth Circuit does not believe *Batson* applies in the civil arena.

> In such a context as this [the civil arena] we see no occasion to inquire into counsel's motives for his strikes or, at any rate, none that outweighs the value of leaving the common-law peremptory challenge system in undiminished affect. [Explanation added].

Edmondson, 895 F.2d at 225-226.

This rationale is particularly applicable when the government is not the party bringing the litigation.

Nothing set forth in the Brief in Opposition overcomes the various issues raised in the petition for certiorari, nor does it challenge that this is a significant issue of federal law upon which this Court needs to rule. Therefore, for all the reasons set forth more fully in the initial petition, the Court should grant the Writ.

CONCLUSION

The Brief in Opposition offers no strong reason to deny the Writ. For the reasons set forth in the Petition for Writ of Certiorari, and in this reply, this Court should grant the Writ and set this matter for plenary review.

Respectfully submitted,

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